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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>FERNANDO DELACRUZ MORALES,<br>Defendant and Appellant. | G055191<br>(Super. Ct. No. 14CF0999)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Reversed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Quisteen S. Shum, and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

Fernando Delacruz Morales appeals from a judgment after the jury convicted him of eight sexual offenses involving two victims, his step-daughters. Morales argues the following:

(1) The trial court erred by admitting his post-*Miranda v. Arizona* (1966) 384 U.S. 436, statements. We agree but conclude Morales was not prejudiced.

(2) The trial court erred by excluding evidence a family member of the victims was molested as a child. We disagree.

(3) The trial court erred by excusing a juror. We agree and conclude Morales was prejudiced requiring reversal of his convictions.

We reverse the judgment.

## FACTS

### *I. Substantive Facts*

#### *A. The Family*

Enrique R. and Miriam G. had four children, L.G. born in 2003, E.R. born in 2006, C.R. born in 2007, and E.R.J. born in 2008. When Enrique's mother died in Mexico in 2010, he went there and never returned. O.L. (Aunt) and her daughter, D.A. (Cousin), Enrique's relatives, lived near Miriam and would care for Miriam's children, even after Enrique left.

Soon after Enrique left, Miriam met Morales, and he moved in with her and her children in a one-bedroom apartment. Morales and Miriam had two children, F.M. born in 2011 and M.M. born in 2014. Morales worked as a gardener, was able to drive, and paid the family's bills. Morales, Miriam, and F.M. would sleep on a bed, M.M. would sleep in a bassinette, and the other children slept on a bunk bed or a mattress on the ground next to the bunk bed.

#### *B. The Disclosure*

About December 2013, L.G. told Miriam that Morales touched E.R. "on her little thing" and tried to kiss her on the mouth. Miriam asked E.R. if Morales touched

her, and she said he did. Miriam confronted Morales and threatened to call the police if he did not stop. Morales promised he would not touch the girls again.

In March 2014, Miriam's children were staying with Aunt and Cousin while Miriam was in the hospital giving birth to M.M. Aunt and Cousin told the children they were going home, and L.G., E.R., and C.R. cried and said they did not want to. When Aunt asked them why they did not want to go home, L.G. and E.R. did not answer. C.R. said, "I know why they don't want to go." When Aunt asked him why, the girls started crying. C.R. said Morales would cover his face with a pillow and kiss and touch the girls. He also stated that when Miriam would do dishes, Morales kissed the girls on the mouth and touched their vaginas. Cousin asked L.G. if it was true, and she said, "Yes." E.R. said, "[Morales] did the same thing to [her] as to [L.G.]." E.R. also said she told Miriam numerous times what Morales had done to them, but she did not do anything. The following day, after Aunt again asked E.R. whether Morales touched her inappropriately, Cousin called the police.

*C. The Investigation*

Before midnight, officer Antonio Graham went to the residence and spoke with L.G. and E.R. E.R. told Graham that Morales touched her inappropriately.

That evening about midnight, Lee Ann Gonzales, a senior social worker with the Orange County Social Services Agency (SSA), went to Aunt and Cousin's residence. E.R. told Gonzales that when she was in first and second grade Morales kissed her on the mouth, touched her vagina, and put his finger inside of her vagina. E.R. told Miriam, but she did not help her.

About the same time, officers Justo Capacete and Eric Rivas went to Miriam and Morales's residence. While Morales slept, Capacete told Miriam why they were there. Miriam said that three months earlier L.G. told her Morales touched E.R. inappropriately. Capacete asked her to wake up Morales, and the officers entered the residence. Capacete told Morales why they were there and asked if he would go with

him to the police station to discuss the allegations. Morales agreed. Capacete drove Morales to the station in his patrol vehicle while Rivas drove separately. When they arrived at the station, Capacete and Rivas walked Morales to an interview room.

During the audiotaped interview, Morales eventually admitted he touched E.R.'s vagina once under her underpants. Capacete then advised Morales of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Capacete continued to question Morales, and he eventually admitted he touched E.R.'s vagina under her underpants once a week for six months. Because Morales challenges admission of some of his post-*Miranda* statements, we will provide a detailed description of the interview later in this opinion.

Two days later, Gonzales spoke to L.G. at school. L.G. said Morales was in jail "because he touched us." L.G. stated that on one occasion, she was in bed and Morales kissed her on the mouth. She said that on another occasion, C.R. saw Morales touch her "privacy" under her pajamas. Gonzales then spoke with C.R. at school. He confirmed that while L.G. and E.R. slept, he saw Morales touch them under their underwear.

A couple days later, Orange County Child Abuse Services Team (CAST) senior social worker Adrianna Ball interviewed E.R. Ball asked E.R. where Morales lived when he did not live with them, and she responded he lived in jail "[b]ecause he did things to [her] and . . . [L.G.]." She stated Morales kissed her on the mouth one night when she was in bed. Morales touched her where you go "pee" beneath her underpants. After he kissed and touched E.R., Morales touched L.G. The last time Morales touched her was when Miriam was pregnant with M.M. He kissed her and touched her private part, and did the same with L.G. E.R. told Miriam what Morales did to her, and Miriam spoke to him. Morales touched her more than 10 times.

Ball then interviewed L.G. When Ball asked L.G. where Morales was, she said he was in jail because at night when everyone was sleeping and he was drinking

beer, he kissed her on the mouth and took off her pants and "touched [her] privacy." L.G. explained it started when Miriam was doing dishes and she was asleep underneath a blanket. He pulled down her pajamas and underpants to her knees and rubbed her vagina back and forth and kissed her on the mouth. Morales touched L.G. when she slept on the floor. L.G. stated she, E.R., and C.R. told Miriam what happened, and she talked to Morales, but he did not listen and nothing changed. Morales touched her at least six times.

*II. Procedural Facts*

An information charged Morales with the following eight offenses involving L.G. and E.R.: L.G.—three counts of committing a lewd act upon a child under the age of 14 (Pen. Code, § 288, subd. (a), all further statutory references are to the Penal Code, unless otherwise indicated), and sexual penetration with a child under the age of 10 (§ 288.7, subd. (b)); and E.R.—sexual penetration with a child under the age of 10 (§ 288.7, subd. (b)), and three counts of committing a lewd act upon a child under the age of 14 (§ 288, subd. (a)). The information alleged Morales committed the six lewd act offenses against more than one victim (§ 667.61, subds. (b), (c) & (e)(4)).

Before trial, Morales filed a motion to suppress his statements pursuant to *Miranda, supra,* 384 U.S. 436. At a hearing, Capacete, Rivas, and Dr. Joseph Cervantes, a forensic psychologist, testified. The trial court granted the motion to suppress Morales's pre-*Miranda* statements, but denied the motion to suppress his post-*Miranda* statements. We will discuss these proceedings in greater detail anon.

At trial, Cousin testified concerning her relationship with Miriam and the children. She testified how she and Aunt first learned Morales sexually assaulted L.G. and E.R. She also stated that because she went to the same school as the children, she knew L.G. and C.R. were having school and behavioral problems. When the prosecutor asked whether she suggested to the children Morales touched their private parts, Cousin answered, "No." When the prosecutor asked whether she convinced the children to

fabricate the allegations against Morales, Cousin answered, "I would never do that." Cousin knew a family member molested Miriam when she was a young girl. We will discuss the scope of defense counsel's cross-examination of Cousin below because it relates to an issue on appeal.

The victims were not as forthcoming about Morales's conduct at trial as they were during their CAST interviews; the audio recordings of the CAST interviews were played for the jury. E.R. testified that at night while she was sleeping, Morales touched her private part, where you "pee out of." She felt something inside her. She denied he kissed her anywhere. She could not remember whether he touched her more than once. She denied telling a police officer or a social worker that Morales put his finger inside her private part, he kissed her, or he put his tongue in her mouth. She also denied seeing Morales do anything to L.G. On cross-examination, defense counsel asked whether she remembered Morales sexually abused her or somebody told her it happened, E.R. answered, "Because I remember."

L.G. testified that on two occasions at night while she was in bed asleep Morales touched where "you go pee" on the skin. He rubbed her vagina. He did not kiss her. She remembered speaking with the police but not Ball.

C.R. testified he saw Morales touch E.R.'s front private parts one time at night in bed. He snuck out of the room and told Miriam, but she did not do anything. On redirect examination, he said Morales put a pillow over his head and touched the girls.

The audio recording of Capacete's post-*Miranda* interview with Morales was played for the jury.

As relevant here, Miriam testified she had a good relationship with Aunt and Cousin. On cross-examination, defense counsel questioned Miriam about a 2010 child neglect report to SSA. When counsel asked whether she believed Aunt made the

report, Miriam was non-responsive.[1] Miriam said Aunt told her not to leave the children alone with Morales.

Aunt testified she told the girls numerous times not to let Morales touch them because she was aware of many cases where family members harmed children. Aunt said she was trying to protect the children.

Dr. Jody Ward, a clinical and forensic psychologist, testified extensively concerning child sexual abuse accommodation syndrome (CSAAS) and its five stages, including secrecy and retraction where the child "backpedal[s]" or says they do not remember.

Morales offered evidence that Aunt and Cousin had a dispute with Miriam, and Aunt influenced the girls to make the accusations against him. After he offered a family member's testimony regarding his good character, Morales offered two identical letters purportedly written by L.G. and E.R. stating Aunt, who was "crazy" and being investigated for attempted murder, "*obliged* [them]" to accuse Morales of improper touching.

Cervantes evaluated Morales's intellectual abilities and opined Morales scored in the mild intellectual disability range. Intelligence quotient (IQ) tests indicated Morales's IQ was 56 or 57. Cervantes interviewed Morales, and the interview validated the IQ test results. He acknowledged Morales's IQ may be higher than the numbers indicate, in the low 70's, because he had developed "street smarts." Cervantes said a person with an IQ below 70 has a significantly reduced ability to process information. He added such a person is more likely to be compliant.

Graham, the officer who responded to Aunt's residence, testified E.R. told him that Morales touched her inappropriately. He stated, however, he mistakenly wrote in his report the perpetrator was their biological father, Enrique.

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[1] A social worker testified there was a complaint involving Miriam.

On rebuttal, L.G. testified she did not write or sign the recantation letter. A handwriting expert analyzed L.G.'s handwriting and the letter and concluded a different individual wrote the letter. The prosecution presented evidence refuting the claim Aunt had been arrested or was being investigated for any crime. Ward testified that she was familiar with IQ testing. Ward stated a person with an IQ of 60 is completely dependent on other people and is incapable of deciding anything other than simple issues. Ward would not expect someone with an IQ of 57 to hold down a job, drive a car, and pay bills.

Counsel presented closing arguments, and the trial court instructed the jury. As the jury was about to begin deliberating, the trial court advised counsel that juror No. 8 (Juror) had a question.[2] After speaking with Juror a couple times, hearing counsel's argument, and researching the issue, the court ultimately excluded Juror and replaced her with an alternate, over defense counsel's objection. We will discuss these proceedings below in greater detail because they relate to an issue on appeal.

The jury convicted Morales of all counts and found the allegations true. The trial court sentenced Morales to prison for 30 years to life, consecutive 15 years to life terms on counts 4 and 5. The court imposed the same term to run concurrently on the remaining counts.

## DISCUSSION

### *I. Post-Miranda Statements*

Morales argues the trial court erred by admitting his post-*Miranda* statements because they were obtained via a two-step interrogation procedure in violation of *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*), and they were involuntary. We agree there was error but conclude Morales was not prejudiced.

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[2] This was immediately after the trial court excused another juror who repeatedly nodded off during the trial.

*A. Facts*

At the beginning of the interview at 1:16 a.m., Capacete told Morales that he was not under arrest and he was free to leave whenever he wanted. Capacete said he wanted to speak with him about some complaints, and Morales agreed. Capacete asked whether he spoke with Miriam about something that happened. Morales told him Aunt would take the children without telling Miriam when she would return them. Capacete asked if there were any other problems involving the girls. Morales said Miriam told him that he should not touch the girls. When Capacete asked him where he touched E.R., he repeatedly answered on the feet, and Capacete replied, "look, I want . . . I just want you to tell me the truth." After Capacete said he spoke with E.R., L.G., and C.R., Morales said Aunt and Cousin "put a lot of things in their heads." Capacete told Morales that he did not want to waste Morales's time and "[he] just want[ed] [Morales] to tell [him] the truth." Capacete asked how many times he touched E.R. when she was asleep. Morales answered one time on the feet. When Capacete asked why E.R., L.G., and C.R. told him something different, Morales again blamed Aunt and Cousin and denied he touched her vagina. Capacete said he had boys and girls the same age and he "[knew] that children . . . are very honest." Morales insisted he touched her feet one time and said he would rather touch his wife than the girls.

After Capacete repeatedly said he did not want it to happen again, he asked Morales how many times he touched E.R. Morales first stated he touched her over the clothes one time on her vagina. When Capacete told Morales that he was not telling the truth, Morales admitted he touched E.R.'s vagina under her clothes one time while she was in bed asleep. Morales again blamed Aunt when Capacete said E.R. reported it happened many times. At about 1:51 a.m., Capacete advised Morales of his *Miranda* rights. Morales stated he understood each of his *Miranda* rights, signed a waiver of those rights, and agreed to answer additional questions.

Capacete immediately resumed questioning Morales. Capacete stated Morales first said he never touched E.R., then Morales said once on the knees/legs, and then he said once on her vagina. Morales insisted he touched E.R.'s vagina only one time over her underpants. Capacete told Morales that both E.R. and C.R. told him that he touched E.R. many times and he did not believe Morales, who was "telling [Capacete] pure lies." Morales stated he touched E.R.'s vagina two times, once underneath her underpants on the skin and once over her underpants. He denied he put his finger inside E.R.'s vagina. He also denied touching L.G. and C.R.

After a break in the interview, Capacete advised Morales to be honest and asked him whether he touched E.R. more than 10 times. Morales told him that he was going to tell the truth. He said he touched E.R. five times. Capacete asked him how many times a week he touched her. Morales responded, "[t]wice a week[]" for six months. He then said once a week for six months and admitted he put his finger inside E.R.'s vagina. Morales repeated he "didn't think it was a big deal." He stated he only touched E.R. The interview ended at 2:23 a.m. At the conclusion of the interview, Capacete arrested Morales.

*B. Pretrial Proceedings*

Before trial, Morales filed a motion to exclude his statements to Capacete because they were in violation of *Seibert* and they were involuntary. At the hearing on the motion, the trial court stated it listened to a recording of the interview and read the transcript.

Capacete testified he and Rivas, who were both in uniform and drove separate marked patrol cars, went to Miriam and Morales's one-room residence about midnight to investigate E.R.'s claim Morales sexually assaulted her. At that point, Capacete knew one child, E.R., reported Morales sexually assaulted her.

When Miriam answered the door, Capacete told her why they were there and asked her if she had previously noticed anything suspicious. Miriam replied L.G.

told her that Morales sexually assaulted E.R. From the doorway threshold where the conversation occurred, Capacete saw Morales and two children sleeping. Miriam invited them into the residence, and Capacete asked her to wake up Morales. After Capacete introduced himself to Morales, he told him why they were there and they wanted to speak with him in a private setting. Capacete offered to take him to the police station and drive him home, and told him it was voluntary and he was not under arrest. Capacete did not draw his gun, handcuff him, threaten him, tell him that he had to go to the police station, or tell him it would be better for him if he cooperated. Morales agreed to go to the police station. Capacete and Morales walked to the patrol car and when Capacete opened the right rear door, Morales got in the car on his own.

At the police station, Capacete opened the right rear door, and Morales got out of the car. Capacete and Rivas walked Morales to a third floor interview room, which measured about six feet by eight feet. Capacete told Morales, who was not handcuffed, to make himself comfortable while Capacete setup the recording device. Capacete left the interview room door open. Capacete told Morales that he was not under arrest, he was free to leave, and the door was open; Capacete sat between Morales and the door.

Capacete testified that when Morales admitted he touched E.R.'s vagina, he felt he had probable cause to arrest him. He stopped the interview and advised Morales of his *Miranda* rights in Spanish. After Morales signed the form indicating he understood his rights, Capacete questioned him further. During the interview, Capacete did not draw his gun, handcuff Morales, or threaten him. At the conclusion of the interview, Capacete arrested Morales.

On cross-examination, Capacete testified he took Morales to the police station so he could explain his version of the events. He explained whether Morales would be released at the end of the interview depended on the totality of the investigation. Capacete believed he probably could have arrested Morales based solely on E.R.'s statements, but he was not certain he had probable cause to arrest Morales. He

felt it was better to interview Morales "in a different setting." At the beginning of the interview, Capacete felt Morales was lying and he wanted to get an admission. When defense counsel asked whether Capacete wanted to get the truth before he provided *Miranda* warnings, he answered the following: "Well, I felt that at that time if he had made any incriminating statements, at that time, absolutely, I would stop the interview, read him his rights, and then continue my investigation. And that's exactly what occurred here."

Rivas testified he was in uniform and drove his marked patrol car first to Miriam and Morales's residence and then to the police station. Rivas and Capacete escorted Morales, who was not handcuffed, to the interview room. Rivas did not draw his gun or threaten Morales. Rivas was not in the interview room while Capacete interviewed Morales.

Cervantes testified for the defense. Cervantes opined Morales had a full scale IQ of 56, which meant he had an intellectual disability and was easily influenced.

The trial court mused there were a number of issues it had to address vis-à-vis his pre-*Miranda* statements and his post-*Miranda* statements and the rule of completeness. As to his pre-*Miranda* statements, the court concluded Capacete clearly interrogated Morales but the issue was whether he was objectively in custody. Defense counsel argued he was in custody because in the middle of the night two officers took him to the police station to be interrogated and Capacete's questions quickly became accusatory. The prosecutor asserted Capacete interviewed Morales in the middle of the night because that was when officers received the complaint and Capacete was not aggressive.

With respect to his post-*Miranda* statements, the court said the issues where whether it was a two-step interrogation procedure and voluntariness. Counsel argued Morales's statements became involuntary on page 57 of the transcript when Capacete began to make implied promises of leniency. The prosecutor asserted that based on a

totality of the circumstances Morales's statements were voluntary. She questioned the premise Morales was intelligent enough to understand an implied promise of leniency but not intelligent enough to understand his *Miranda* rights. The prosecutor disagreed with the trial court's concern Morales's statements became involuntary when Capacete suggested answers to questions, i.e., "it's going to be more than [10] times."

The trial court addressed the *Seibert* issue first. The court opined both officers were credible and believable. The court concluded Capacete did not engage in a two-step interrogation procedure based on the objective and subjective *Seibert* factors. The court "credit[ed]" Capacete's admission he was not convinced there was probable cause to arrest until Morales admitted he touched E.R. one time. The court noted it was common in sexual assault cases "to get both sides of it" and the location and time of the interview were not "technique[s] . . . to obtain additional influence over [Morales]" but instead were "ordinary" and "part of a continuing investigation." The court found there was no *Seibert* violation.

The trial court then addressed the voluntariness issue, which it characterized as "a close call" because Capacete suggested answers to questions. The court found it important Capacete did not use ruses, promise leniency, make threats, or show force. The court reasoned that because of the nature of the allegations and the residence had just one room, with Miriam and children present, the police station was the proper place to conduct the interview. Although Capacete sat between Morales and the interview room door, the court explained the door was open and there was only one officer present, and Morales "[held] his own through most of this very difficult interview." The court characterized Capacete's tone as non-confrontational and "fairly even." Based on a totality of the circumstances, including that Capacete advised Morales of his *Miranda* rights both orally and in writing, the court concluded Morales's statements were voluntary.

However, the trial court was "troubled by . . . the pre-*Miranda* portion" and concluded Capacete should have advised Morales of his *Miranda* rights at the beginning of the interview. The court opined Capacete "grilled" Morales and his suspicion "land[ed] fully on [Morales]." The court excluded the pre-*Miranda* portion of the interview, unless Morales wanted to admit it pursuant to the rule of completeness. The court stated that while reasonable minds could differ, it was not worth risking reversal and retrial where the victims would have to testify again.

*C. Analysis*

*1. Two-Step Interrogation Procedure*

In *Seibert*, the United States Supreme Court addressed the admissibility of a statement police obtained via a "protocol" in which police subjected defendant to a custodial interrogation without *Miranda* warnings, and then, following defendant's confession, police gave *Miranda* warnings and subjected defendant to a second interrogation where she made the same confession. (*Seibert, supra,* 542 U.S. at pp. 604-605 (plur. opn. of Souter, J.).) In that case, defendant's 12-year-old son (Son), who suffered from cerebral palsy, died in his sleep. (*Id.* at p. 604 (plur. opn. of Souter, J.).) Defendant feared being charged with neglect and decided to enlist her other two sons and their two friends to incinerate Son's body by burning down the family's mobile home. To avoid the appearance they left Son home alone, defendant and her accomplices left a mentally ill teenage boy who was living with the family in the mobile home when they set the fire, and he perished. One of defendant's sons was burned while setting the fire and had to go to the hospital. (*Ibid.*)

Days later, police officers went to the hospital in the middle of the night, awakened defendant, and took her to the police station. (*Seibert, supra,* 542 U.S. at pp. 604-605 (plur. opn. of Souter, J.).) After defendant sat alone in the interview room for 15 to 20 minutes, a police officer questioned her for 30 to 40 minutes without *Miranda* warnings, and she admitted she knew the boy would die in the fire. (*Ibid.*)

After the police officer gave defendant a 20-minute break, he gave her *Miranda* warnings and continued to interrogate her. (*Id.* at p. 605 (plur. opn. of Souter, J.).) The police officer confronted defendant with her pre-*Miranda* statements and obtained more confessions from her. (*Ibid.*) At the suppression hearing, the officer testified "he made a 'conscious decision' to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.' [Citation.]" (*Id.* at pp. 605-606 (plur. opn. of Souter, J.).)

Five justices in three opinions held the mid-interrogation warnings were ineffective and therefore defendant's postwarning confession was inadmissible. (*Seibert, supra,* 542 U.S. at pp. 617, 618, 622.) Justice Souter's plurality opinion stated "[t]he threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires." (*Seibert, supra,* 542 U.S. at pp. 611-612 (plur. opn. of Souter, J.).) The plurality opinion reasoned the giving of midstream *Miranda* warnings "without expressly excepting the statement just given, could lead to an entirely reasonable inference that what [defendant] has just said will be used, with subsequent silence being of no avail." (*Id.* at p. 613 (plur. opn. of Souter, J.).) The plurality identified the following factors to determine whether midstream *Miranda* warnings were effective: "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." (*Id.* at p. 615 (plur. opn. of Souter, J.).) The plurality opinion concluded the facts did not reasonably support the conclusion the warnings served *Miranda's* purpose of reducing the risk of admitting coerced confessions. (*Id.* at p. 617 (plur. opn. of Souter, J.).)

Justice Kennedy wrote a concurring opinion in which he agreed the use of the interrogation technique rendered defendant's statements inadmissible. (*Seibert, supra,* 542 U.S. at p. 618 (conc. opn. of Kennedy, J.).) "Because Justice Kennedy 'concurred in the judgment[] on the narrowest grounds' [citation], his concurring opinion represents the *Seibert* holding." (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1370, fn. omitted (*Camino*).)

Whereas the plurality opinion focused on objective circumstances, Justice Kennedy stated that "cuts too broadly[]" and he focused on the interrogating officer's subjective intent, providing the following rule: "If the deliberate two-step strategy has been used, *postwarning statements that are related to the substance of prewarning statements must be excluded* unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver." (*Seibert, supra,* 542 U.S. at p. 622 (conc. opn. of Kennedy, J.), italics added.) Justice Kennedy provided two curative measures. First, "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. [Citation.]" (*Ibid*.) Second, "an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." (*Ibid*.) Justice Kennedy added that in cases where there is no evidence police deliberately used the two-step interrogation procedure, "[t]he admissibility of postwarning statements should continue to be governed by the principles of [*Oregon v.*] *Elstad* [(1985) 470 U.S. 298 (*Elstad*)]." (*Seibert, supra,* 542 U.S. at p. 622 (conc. opn. of Kennedy, J.).)

Courts have commented Justice Kennedy did not articulate how trial courts should determine deliberateness. (*Camino, supra,* 188 Cal.App.4th at p. 1370; *People v. Rios* (2009) 179 Cal.App.4th 491, 504-505; *United States v. Williams* (9th Cir. 2006)

435 F.3d 1148, 1158 (*Williams*).) California appellate courts have approved the Ninth Circuit's interpretation of *Seibert* in *Williams, supra,* 435 F.3d 1148. (*Camino, supra,* 188 Cal.App.4th at pp. 1370-1371; *Rios, supra,* 179 Cal.App.4th at p. 505.) Thus, "'[C]ourts should consider whether objective evidence and any available subjective evidence, such as an officer's testimony, support an inference that the two-step interrogation procedure was used to undermine the *Miranda* 'warning.' [Citation.]" (*Camino, supra,* 188 Cal.App.4th at p. 1370; *Williams, supra,* 435 F.3d at pp. 1157-1158, 1160 [did officer act deliberately to undermine and obscure *Miranda's* meaning and effect?].) Thus, in addressing *Seibert* claims, courts have generally applied both the plurality's factors and Justice Kennedy's more narrow test and its curative measures. We will do the same.

"'In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda* . . . , the scope of our review is well established. "We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained."' [Citation.] '"Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we '"give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.'"' [Citation.]" (*Camino, supra,* 188 Cal.App.4th at pp. 1370-1371.) Here, based on both Justice Kennedy's test and the plurality's factors, we conclude Capacete engaged in a deliberate two-step strategy to undermine *Miranda's* protections.

*a. Subjective Evidence of Intent*

With respect to Justice Kennedy's test and its curative measures, we conclude there was evidence Capacete subjectively intended to use a two-step procedure.

"Subjective evidence of the investigators' intent, if credible, will of course be persuasive, and often decisive." (*United States v. Moore* (2d Cir. 2012) 670 F.3d 222, 230, fn. 3.) The trial court found Capacete to be truthful, honest, and credible. On direct examination, Capacete stated he knew E.R. reported Morales sexually assaulted her, but he was unsure whether he had probable cause to arrest Morales. He wanted to interview Morales at the police station to get his version of the events. But on cross-examination, Capacete acknowledged he could have arrested Morales based on E.R.'s allegation. Capacete added he felt Morales was lying and he wanted to get an admission.

In *Seibert*, the plurality stated, "Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work." (*Seibert, supra,* 542 U.S. at p. 616, fn. 6 (plur. opn. of Souter, J.).)

Here, Capacete candidly admitted his intent during cross-examination. Counsel asked Capacete whether he wanted to get the truth before he provided *Miranda* warnings. He answered the following: "Well, I felt that at that time if he had made any incriminating statements, at that time, absolutely, I would stop the interview, read him his rights, and then continue my investigation. And that's exactly what occurred here." Like in *Seibert,* where the interrogating officer testified he made a "'conscious decision'" to withhold *Miranda* warnings, using an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "'until I get the answer that she's already provided once[,]'" Capacete provided similar testimony. (*Seibert, supra,* 542 U.S. at pp. 605-606 (plur. opn. of Souter, J.).) Capacete, who thought Morales was lying and wanted to get an admission, testified he deliberately engaged in a question first, warn, and repeat the question. This was improper.

Additionally, the two curative measures Justice Kennedy provided were not present here. First, there was not "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning." (*Seibert, supra,* 542 U.S. at p. 622

(conc. opn. of Kennedy, J.).) There was no break in time, substantial or otherwise. Morales admitted he touched E.R.'s vagina one time under her clothes, Capacete provided *Miranda* warnings, and Capacate immediately resumed questioning Morales. The lack of any break in time prevented Morales from distinguishing the first interrogation from the second and appreciating the fact the interrogation took a new turn. (*Ibid*.) Second, Capacete did not provide "an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient." (*Ibid*.) To the contrary, almost immediately after he provided *Miranda* warnings, Capacete referenced Morales's inculpatory statement. Capacete's admission he deliberately engaged in a two-step procedure and the lack of any curative measures was subjective evidence of Capacete's intent to undermine *Miranda*'s protections.

*b. Objective Evidence of Intent*

*i. Completeness and Detail of Questions & Answers of First Interrogation*

Following *Seibert*, courts have considered the thoroughness and detail of the prewarning interrogation as objective evidence of intent. (*Camino, supra,* 188 Cal.App.4th at p. 1370.) In *Seibert*, the court noted the unwarned interrogation "was conducted in the station house, and the questioning was systematic, exhaustive, . . . managed with psychological skill. . . . [T]here was little, if anything, of incriminating potential left unsaid." (*Seibert, supra,* 542 U.S. at p. 616 (plur. opn. of Souter, J.).) In contrast, courts have found no deliberate intent to circumvent *Miranda* where the initial questioning was "'brief and spare.'" (*United States v. Williams* (2d. Cir. 2012) 681 F.3d 35, 44.)

Here, the first interrogation lasted approximately 35 minutes. Capacete asked Morales many questions, the focus of which were the sexual abuse of the girls. Capacete's questions were designed to elicit inculpatory responses. Capacete asked the critical question, whether he touched the girls inappropriately, at least 10 times during the first interrogation. Capacete's technique was successful because after 30 minutes of

questioning, Morales finally admitted he touched E.R.'s vagina one time under her clothes. Like in *Seibert,* where the officer questioned defendant for 30 to 40 minutes until she finally confessed (*Seibert, supra,* 542 U.S. at pp. 604-605 (plur. opn. of Souter, J.)), here Capacete questioned Morales for about 35 minutes until he confessed. Capacete's questioning of Morales was not "'brief and spare.'" (*United States v. Williams, supra,* 681 F.3d at p. 44.)

*ii. Overlapping Content of the Two Statements*

The overlapping content of the pre-*Miranda* warning content and the post-*Miranda* warning content demonstrates "the temptations for abuse inherent in the two-step technique." (*Seibert, supra,* 542 U.S. at p. 621 (conc. opn. of Kennedy, J.).) Here, there was an overlap of content. Prewarning, Capacete's questions focused on whether Morales touched the girls inappropriately. Morales eventually admitted he touched E.R.'s vagina one time under her clothes. Postwarning, Capacete's questions again focused on whether Morales touched the girls inappropriately. Morales admitted he did it more often. Although Capacete elicited additional inculpatory information from Morales postwarning, there was significant overlap between the two statements. (*Seibert, supra,* 542 U.S. at p. 616 (plur. opn. of Souter, J.) [when officer finished with prewarning interrogation little left unsaid].) This was not a situation where prewarning Capacete questioned Morales only about the family, their residence, and his relationship with his step-daughters and then postwarning questioned him about inappropriate touching. Nor was it a situation where Capacete treated Morales as a *witness* prewarning and treated him as the *perpetrator* postwarning. The overlap was significant.

*iii. Timing and Setting of the First and the Second Interrogations*

Following *Seibert,* courts have considered the proximity in time and the setting of the interrogations as objective evidence of intent. (*Camino, supra,* 188 Cal.App.4th at pp. 1370, 1376.) We note the trial court ultimately concluded, and we agree, the prewarning interview had "'all the earmarkings of a classic custodial

interrogation.'" (*Id.* at p. 1376.) Capacete, who was in uniform and armed, interrogated Morales in the middle of the night at the police station. The prewarning interrogation lasted about 35 minutes before Capacete advised Morales of his *Miranda* rights. There was no break in time and circumstances between the first interrogation and the second interrogation. Capacete continued to question Morales in the same room. The postwarning interrogation lasted about 30 minutes. There was no break in time or setting.

*iv. Continuity of Police Personnel*

Continuity of police personnel is objective evidence of intent because the officer who heard a prewarning confession is able to compel a defendant to repeat the confession. (*Camino, supra*, 188 Cal.App.4th at p. 1376.) Here, Capacete interrogated Morales both prewarning and postwarning. The temptations for abuse inherent in the two-step procedure are present here because during the prewarning interrogation Capacete elicited an inculpatory statement. With no break in time or setting, Capacete used the inculpatory statement to compel Morales to repeat his confession.

*v. Degree to which Questions Treated Second Round as Continuous with First Round*

In *Seibert*, the interrogating officer "relied on the defendant's prewarning statement to obtain the postwarning statement used against her at trial," such that the postwarning interview "resembled a cross-examination." (*Seibert, supra*, 542 U.S. at p. 621 (conc. opn. of Kennedy, J.).) The same is true here. Although Capacete advised Morales of his *Miranda* rights, orally and in writing, and Morales agreed to answer questions, Capacete quickly referred to Morales's prewarning inculpatory statement such that the postwarning interview resembled a cross-examination. Immediately after the warning, Capacete noted Morales first denied he ever touched E.R., then he said once on the knees/legs, and then he said once on her vagina. Capacete used this statement to try to confirm the girls reports Morales touched the girls many times. Thus, the record includes objective evidence of Capacete's intent to undermine *Miranda's* protections.

Both the subjective and objective factors establish Capacete employed a deliberate two-step procedure of question first warn later to undermine *Miranda's* protections. Because we conclude Capacete employed a deliberate two-step procedure in violation of *Seibert*, we need not address Morales's claim his statements were involuntary in violation of *Elstad*. We must now determine whether Morales was prejudiced. He was not.

*2. Prejudice*

Admission in evidence of statements obtained in violation of *Miranda* is subject to the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*), which requires the error to be harmless beyond a reasonable doubt. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310 (*Fulminante*); *People v. Neal* (2003) 31 Cal.4th 63, 86 (*Neal*).) Under the *Chapman* test, error is harmless when it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra,* 386 U.S. at p. 24.) To make this determination we must conclude the admission of Morales's postwarning statements was unimportant in relation to everything else the jury considered and did not contribute to his convictions. (*Fulminante, supra,* 499 U.S. at pp. 295-297; *Neal, supra,* 31 Cal.4th at p. 86.)

Here, there was sufficient evidence supporting Morales's convictions. When Miriam was in the hospital giving birth, the children stayed with Aunt and Cousin. When Aunt and Cousin told the children they were going home soon, the children became visibly upset and said they did not want to go home. When L.G. and E.R., the two victims, refused to explain why they were upset, C.R. explained he saw Morales kiss and touch the girls, despite Morales covering his face with a pillow. First L.G. and then E.R. confirmed C.R.'s account.

Morales makes much of the fact the children made the allegations while they were with Aunt and Cousin, who were related to the children's biological father, and Miriam, Aunt, and Cousin had personal experiences with sexual abuse by family

members. This evidence, Morales asserts, supports his defense Aunt and Cousin influenced the girls to make the accusations against him. But this was not the first time E.R. accused Morales of sexually assaulting her. About three months before L.G. and E.R. told Aunt and Cousin that Morales sexually assaulted them, they told their mother, Miriam, that he touched them inappropriately. Relying on the 2010 child neglect report, he also claims hostility between Miriam and Aunt and Cousin contributed to the false accusations. To the contrary, Miriam testified she had a good relationship with Aunt and Cousin and they watched her children well past the time the complaint was made, including when the sexual abuse came to light.

Additionally, both E.R. and L.G. told social workers the same story. E.R., L.G., and C.R. all told social worker Gonzales that Morales sexually assaulted the girls. E.R. also told Gonzales that she told Miriam, but she did nothing. E.R. and L.G. later told social worker Ball the same story—that Morales sexually assaulted them. E.R. also told Ball that she saw Morales sexually assault L.G. L.G. stated she and her siblings told Miriam but nothing changed. It is true L.G. initially could not recall whether Morales touched her, and L.G. and E.R. were less forthcoming at trial. But Ward provided testimony their secrecy and hesitancy was consistent with CSAAS. Additionally, C.R. corroborated L.G.'s and E.R.'s testimony Morales sexually assaulted them. Morales asserts C.R. had credibility issues and disputes he corroborated the girls testimony because he had behavioral problems. But on three separate occasions, to his Aunt and Cousin, to social worker Gonzales, and at trial, he told the same story—he saw Morales sexually assault L.G. and E.R. Finally, any suggestion Enrique sexually assaulted the girls is belied by the record.

*II. Cousin's Testimony*

Morales argues the trial court erred by excluding evidence Cousin was molested when she was young pursuant to California and federal law. Not so.

*A. Facts*

At a recess during cross-examination, the prosecutor informed the trial court that Cousin told either a police officer or social worker someone molested her when she was a child. The prosecutor objected to admission of the evidence because it was irrelevant and speculative, and on Evidence Code section 352 grounds. Defense counsel asserted the evidence was relevant to Morales's defense Aunt and Cousin influenced the girls to make the accusations because it demonstrated where the idea originated. Counsel believed Cousin told the girls that she was molested. When the trial court asked what that belief was based on, counsel responded, "Because these kids must have gotten it from somewhere, and it wasn't from my client."

The trial court granted the prosecution's motion to exclude the evidence, characterizing it as not "a close call at all." The court explained it was too speculative to conclude Cousin told the girls she had been molested. The court opined the evidence was not relevant because it was not more likely someone who was molested would suggest to a child she might have been molested. Additionally, the court said admission of the evidence would confuse the issues and unduly consume time.

Defense counsel argued the trial court's ruling infringed on Morales's right to present a defense and have a fair trial. Counsel argued that even if Cousin did not tell the children she was molested, the defense was entitled to inquire on this topic so the jury could observe her demeanor and assess her credibility. The court repeated the evidence was not relevant.

When cross-examination resumed, Cousin testified she did not tell Miriam before she called the police because Miriam was also a victim of sexual abuse as a child. She added, "I know by experience that when things like that happen to you, it might seem normal to you." When defense counsel asked whether she was sensitive to the issue of child molestation because she was aware of Miriam's experience, Cousin answered, "I know the difference between the -- actually happening to a child and pretending to the

child. Child doesn't experience that type of trauma and not be affected by it in a dramatic way." Counsel asked how she knew that, and Cousin responded, "Because I was a child of molestation too." The trial court sustained the prosecution's relevance objection. The prosecutor did not request the answer be stricken.

*B. California Law*

"'Only relevant evidence is admissible (Evid. Code, §§ 210, 350), and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. (Evid. Code, § 351 . . . .) The test of relevance is whether the evidence "tends 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive." [Citation.] The trial court has broad discretion in determining the relevance of evidence, but lacks discretion to admit irrelevant evidence. [Citation.] We review for abuse of discretion a trial court's rulings on the admissibility of evidence. [Citation.]' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 482.)

Evidence Code section 352, however, authorizes a trial court to exclude relevant evidence. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) For purposes of Evidence Code section 352, prejudice means "'evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]'" (*People v. Heard* (2003) 31 Cal.4th 946, 976.)

Here, the trial court did not abuse its discretion by excluding evidence Cousin was molested as a child because the evidence was irrelevant and speculative. Evidence Cousin was molested as a child was not relevant because it did not tend to prove she would suggest to L.G. or E.R. they were molested or suggest they should fabricate such a story. Additionally, there was no evidence Cousin told the children that she was molested as a child, and Morales's offer of proof on this point was pure

speculation. (*People v. Morrison* (2004) 34 Cal.4th 698, 711 [evidence irrelevant if it leads only to speculative inferences].) Indeed, Cousin denied she suggested to the children that Morales touched them inappropriately and she categorically denied she tried to convince them to fabricate the allegations.

Moreover, the trial court did not abuse its discretion by concluding Evidence Code section 352 prohibited its admission. As we explain above, this evidence had little, if any, probative value. Thus, admission of this evidence would have only confused the jury. The jury would have had to speculate as to the evidence's purpose. Contrary to Morales's claim otherwise, the court did rely on the fact admission of the evidence would unduly consume time and confuse the issues because it would involve separate events with a separate perpetrator at a separate time. Thus, the court did not err by excluding this evidence because it was irrelevant and confusing. Because we have concluded there was no error under California law, we need not address his claim he was prejudiced pursuant to *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

*C. Federal Due Process*

"'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense.' [Citations.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 218.) "Excluding irrelevant evidence did not deprive defendant of his right to present a defense. [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 445.) As we explain above, evidence Cousin was molested as a child was irrelevant here. The trial court did not prevent Morales from presenting his defense by excluding evidence that did not tend to support his defense. Because we have concluded there was no error under federal law, we need not address his claim he was prejudiced pursuant to *Chapman, supra,* 386 U.S. 18.

*III. Juror Removal*

Morales contends the trial court erred by discharging Juror. We agree.

*A. Facts*

As the jury was about to begin deliberating, the trial court advised counsel that Juror had a question she wanted to ask the court. The court invited Juror and counsel to discuss the matter outside the presence of the other jurors.

Juror stated the following: "Okay. When we start talking about the expert's witnesses -- witness and on the case that I was talking about the IQ's and stuff, well, I've had IQ, plus my kids have had those tests, and mine is like in the 50's. And me and my kids are considered retarded but, you know, we're not. We can make it in the world. Do I bring that out or do I just take whichever stand -- whichever one that I believe? I don't know or did I just -- you know, don't bring my personal stuff in? I don't know how to do that." Juror added one of her sons had an IQ of 70, and she and another son were in the 50 range; Juror indicated her test was two years earlier. The court discussed the matter with counsel outside Juror's presence.

Defense counsel argued it was inappropriate to inquire further of Juror because she was sharing her thoughts, which might reveal how she will deliberate. Counsel thought it improper to answer her individual questions. When the trial court suggested asking Juror if she understood the evidence, argument, and instructions, defense counsel did not object to a limited inquiry but was concerned Juror would offer more information. Counsel added the questions were unnecessary because Juror did not indicate she failed to understand the proceedings and her question concerned a different issue.

The trial court stated it was inclined to advise Juror she could not consider or discuss with other jurors her or her sons' IQ tests. The court was also concerned Juror could not understand the proceedings. The prosecutor responded she was concerned Juror would share her personal experiences. She agreed the court should ask Juror whether she understood the proceedings.

Defense counsel objected because it invaded the jury's province during deliberations outside the presence of the other 11 jurors. Counsel commented the trial court already let Juror speak for too long. The court responded it commonly conducted an investigation into jury transgressions and admonished the jury if necessary. Defense counsel reconsidered and objected to further inquiry of Juror. The prosecutor did not object to further inquiry, analogizing to a situation where a juror had been molested and wanted to discuss that during deliberations. The court took a recess to research the issue.

After the recess, the trial court indicated it would make an inquiry under Civil Procedure Code section 203, subdivision (a)(8), to determine whether Juror was subject to a conservatorship. In addition, the court opined due process may require all jurors are mentally competent to understand the proceedings. The court characterized its inquiry as a two-step process, whether Juror was qualified to be a juror, and whether Juror could follow the court's instructions. The court said it would limit its inquiry to those two topics to avoid Juror sharing her thoughts on the evidence. The prosecutor agreed with the court's approach, and defense counsel objected. The court overruled the objection, and Juror returned.

The trial court asked Juror whether she was subject to a conservatorship. Juror responded, "What is that?" The court asked whether she came to court for a proceeding where someone else was given the ability to make important life decisions for her. Juror said, "I don't understand. I'm not understanding." The court asked, "[T]o your knowledge, you're not a subject of a court ordered conservatorship?" Juror responded, "Oh, did I get something in the mail to report to jury duty?" The court again asked whether there was a proceeding where the court appointed a person to assist her with making decisions for her. Juror replied, "Oh, no. No." When the court asked whether she lived on her own or in a group home, Juror said she lived on her own. When the court asked what type of work she did, Juror stated the following: "Caregiver. And I went to Fullerton and Cypress to be an embalmer, but it's not happening. But I did go to

Anaheim Community College to -- for funeral services so I can work in the funeral business. I just can't pass the classes, the anatomy that I need to be an embalmer. [¶] . . . [¶] I can work in the funeral home. I'm just as happy in any area that I can."

The trial court told Juror that it was going to ask some questions that required only "yes or no" answers. The court added though she could explain her answer. The court asked whether she understood the evidence. She responded, "Yes." The court asked whether she understood the lawyers' arguments. She responded, "Yes." The court asked whether she understood its instructions. She responded the following, "Yes. Take consideration of the evidence and not what the attorneys says but the evidence that's presented in front of us." The court asked whether she could express her thoughts to the other jurors during deliberations. She responded, "Yes." When asked, she repeated her and her sons' IQ scores/ranges. The court asked Juror to wait in the hall so it could speak with counsel and not to speak with the other jurors about their discussion.

The trial court told counsel it would admonish Juror not to rely on her personal experience with IQ tests. The prosecutor said she was not requesting Juror be excused because Juror said she understood the proceedings. Defense counsel requested the court not excuse Juror and objected to an individual admonishment, asking the court to give any admonishment to the entire jury. The court opined it was a personal issue with Juror and it was going to inquire with her individually and admonish her.

The trial court called Juror back into the courtroom and told her to disregard her personal experience with IQ tests and to not discuss those tests with the other jurors. The court told Juror to evaluate the case based on the evidence and the instructions. When the court asked whether she could do that, Juror responded the following: "Yes. That's what I was asking when I came in. Remember, I was asking that --[.]" The court allowed Juror to remain on the jury.

The following morning, the trial court told counsel that it had reconsidered its ruling because Morales was entitled to the decision of 12 individual jurors. The court explained both Ward and Cervantes testified a person with an IQ in the mid 50's is not capable of deciding anything other than simple issues. Ward testified such a person would require care and guidance for everyday decisions. Cervantes testified such a person was extremely suggestible and easily influenced. After the court said the trial was extremely complicated, it stated the following: "The court does not intend to intellectually vet jurors, but a juror who comes forward and says that her IQ is this low in the mildly disabled range but very close to moderately disabled, a juror who comes forward and advises the court of that is advising the court that she is not capable of doing what a juror needs to do, deciding the case for herself." The court had "no confidence at all" Morales would receive the considered judgment and decision of 12 individual jurors if it retained Juror.

The trial court stated that although Juror confirmed she understood the evidence, arguments, and instructions, "it is very difficult to know what you don't know." Based on its investigation, including Juror's answers and the psychologists' testimony, the court explained it made the independent determination Juror cannot "provide an independent decision on a complicated matter like this." The court repeated it was not intellectually vetting jurors and stated a low IQ does not disqualify a person from jury service. The court added, however, "[Morales] ha[d] the right to the independent determination of 12 individual jurors." The court concluded that if it did not replace Juror "there will be possibly years of appeals on this exact point." The prosecutor, a different prosecutor who was specially appearing for the prosecutor who tried the case, agreed the court should excuse Juror because the evidence and instructions were difficult.

Defense counsel objected to the trial court excusing Juror. Counsel explained it envisioned the basis of the appeal in this case to be Morales and Juror had the same mental capacity and Morales was found competent to stand trial and understand

the proceedings (§ 1368) but Juror was found mentally incompetent to serve on the jury. Counsel asserted there was no grounds to excuse Juror because her responses indicated she understood the proceedings. Counsel asserted Juror had been to college, was not institutionalized, and did not require someone to care for her. Counsel noted Juror was a "caretaker so she actually takes care of other people." Counsel asserted the prosecutor who tried the case did not think the court should excuse juror. Counsel argued Morales had not only the right to an independent decision from each juror but also a jury of his peers. Counsel stated "all that we've really learned here is that a juror has something in common with my client."

After the prosecutor moved to excuse Juror, the trial court reasoned that Morales was entitled to not only a jury of his peers, but he was also entitled to each juror's independent judgment. The court disagreed with the theory that because Morales suffers from an intellectual disability he was entitled to have a juror with an intellectual disability. The court repeated it was not intellectually vetting jurors but due process required it excuse Juror. The trial court denied Morales's motion for mistrial. An alternate juror was selected, and jury deliberations began.

*B. Law*

A trial court may discharge a juror at any time during trial if upon good cause the court finds that the juror is "unable to perform his or her duty."[3] (§ 1089.) Section 1089 does not define good cause. "The definition has evolved on a case-by-case basis since the term was added to the statute in 1933." (*People v. Bowers* (2001)

[3] Section 1089 authorizes the trial court to discharge a juror and replace her with an alternate for four reasons: death, illness, good cause, or a juror requests a discharge for good cause.

87 Cal.App.4th 722, 730.)[4] Examples of good cause include juror bias, juror incompetence, and juror misconduct. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478 (*Cleveland*).)

"Although this court reviews for abuse of discretion a court's ruling discharging a juror pursuant to section 1089 [citation], . . . such review involves a 'heightened standard [that] more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury.' [Citations.] Specifically, the juror's 'inability to perform' his or her duty 'must appear in the record as a demonstrable reality.' [Citations.] [¶] Under the demonstrable reality standard, a reviewing court's task is more 'than simply determining whether any substantial evidence in the record supports the trial court's decision.' [Citation.] 'A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. . . . [¶] The demonstrable reality test entails a more comprehensive and less deferential review. It requires a showing that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that [good cause for removing the juror is] established. It is important to make clear that a reviewing court does not *reweigh* the evidence under either test. Under the demonstrable reality standard, however, the reviewing court must be confident that the trial court's conclusion is manifestly supported by evidence on which the court actually relied. [¶] In reaching that conclusion, the reviewing panel will consider not just the evidence itself, but also the record of reasons the court provides.' [Citation.]" (*People v. Armstrong* (2016) 1 Cal.5th 432, 450-451

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[4] The Code of Civil Procedure has similar provisions for good cause (Code Civ. Proc., §§ 233, 234), and a provision specifying eight categories of people who are unqualified to be a juror (Code Civ. Proc., § 203).

(*Armstrong*).) This heightened standard more fully reflects an appellate court's obligation to protect a defendant's fundamental rights to due process and to a fair trial by an unbiased jury. (*People v. Allen and Johnson* (2011)
53 Cal.4th 60, 71 (*Allen and Johnson*))

*C. Analysis*

Applying the heightened demonstrable reality standard of review, and based on our examination of the record as a whole, we conclude the trial court abused its discretion in discharging Juror because her inability to perform her duty as a juror does not appear in the record as a demonstrable reality. At the outset, we note that during the discussion of this issue the trial court did not refer to section 1089 or mention the "good cause" standard. The court stated it would search the California Rules of Court for guidance, and the court did reference Code of Civil Procedure section 203. That section states all persons are eligible and qualified to be jurors except eight categories of people. However, the court did say it had "no confidence at all" Morales would receive the considered judgment and decision of 12 individual jurors if it retained Juror. We interpret the court's comment as its finding of good cause to excuse Juror. We must now consider the evidence and the trial court's reasons and determine whether the court's conclusion is manifestly supported by evidence on which the court actually relied. It is not.

Based on our review of the trial court's comments, there were two issues the court was concerned with from the outset. First, the court was concerned whether Juror could follow the court's instructions. Second, the court was concerned whether Juror was capable of understanding the evidence, argument, and instructions due to her low IQ.

After questioning Juror about whether she was subject to a conservatorship (she was not) and asking her whether she understood the evidence, arguments, and instructions (she did), Juror stated, in her own words, she had to consider the evidence

presented and not the attorneys' argument. When the trial court asked Juror whether she could express her thoughts to the other Jurors and participate in a discussion about the case, she replied, "Oh, yes." There was a brief discussion with counsel outside Juror's presence. When Juror returned, the court instructed Juror she had to base her decision on the evidence presented. The court stated she could not consider her or her sons' IQ tests or discuss those tests with the other jurors. She replied, "Yes[,]" and added, in her own words, that was the question she asked at the beginning. Juror's responses satisfied the court, and the court allowed Juror to remain on the jury. Overnight, the court changed its mind.

The next morning, the trial court said it reconsidered the issue and would discharge Juror because it was not confident that if Juror remained on the panel, Morales would receive the considered judgment and decision of 12 individual jurors. Although the court claimed it did not intend to test jurors for their IQ and repeatedly stated it was not intellectually vetting jurors, the court relied in large part on Ward's and Cervantes's testimony concerning the cognitive ability of people with low IQs. The court discharged Juror because "a juror whom comes forward and says that her IQ is this low in the mildly disabled range but very close to moderately disabled . . . is advising the court that she is not capable of doing what a juror needs to do, deciding the case for herself." In other words, the trial court did not believe Juror had the intellectual capacity to *individually* decide the facts, apply them to the law, deliberate, and render a decision. In fact, the court intellectually vetted Juror and discharged her because she was not intellectually qualified.

A defendant has the right to a trial by jurors who are mentally competent and unbiased. (*Jordan v. Massachusetts* (1912) 225 U.S. 167, 176; *People v. Millwee* (1998) 18 Cal.4th 96, 144 (*Millwee*).) A person is deemed mentally competent to serve as a juror if he or she is "'[i]n possession of his or her natural faculties and of ordinary intelligence,'" and is able to understand the nature of the proceedings and deliberate

rationally. (*Millwee*, *supra*, 18 Cal.4th at p. 144, fn. omitted.) Jurors are presumed sane and a party claiming otherwise bears the burden of proving the contention by a preponderance of the evidence. (*Church v. Capital Freight Lines* (1956) 141 Cal.App.2d 246, 248.)

Here, the trial court's conclusion is not manifestly supported by the evidence on which the court actually relied. The basis for the court's ruling was Juror's representation her IQ was in the 50s when she was tested two years earlier. There was no evidence concerning Juror's IQ. Juror's IQ test was not admitted into evidence. The record is void of when she took her IQ test, the type of IQ test she took, and most importantly her actual score. Juror's representation about her own IQ test was without foundation and speculative. Moreover, there was evidence Juror was not intellectually impaired. Juror stated she lived on her own with her children, had a job as a caregiver, and took courses at three different community colleges.[5] There was no indication Juror showed signs of mental incompetence during voir dire or trial. There was no evidence Juror could not make it to the courthouse, was late to court, or could not follow any of the trial court's instructions.

To the contrary, the evidence before the trial court established Juror was attentive during trial, heard and considered the evidence, heard and considered the court's instructions, identified a potential problem based on her personal experience and the court's instructions, and had the courage and intellect to communicate that potential issue to the trial court. Additionally, the record reflects Juror was capable of engaging in what must have felt like a cross-examination from a likely intimidating person in a position of authority in front of complete strangers. That she had the wherewithal to withstand this process, a process the trial court was obligated to perform, demonstrates Juror was capable of *individually* deciding the facts, applying them to the law, deliberating, and

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[5] Juror admitted she could not pass the anatomy class required to be an embalmer. Failure to pass an anatomy class is not evidence of mental incompetence.

rendering a decision. When asked, Juror confirmed she understood the evidence presented, counsels' arguments, and the trial court's instructions, and at one point repeated, in her own words, one of the court's instructions, likely the instruction that raised a red flag for her. Additionally, when asked, Juror stated she could express her thoughts to the other jurors and deliberate with the other jurors.

Finally, the trial court asked Juror whether she could evaluate the case based on the evidence and instructions and not consider or mention to other jurors her personal experience with IQ tests, and she responded, "Yes." Juror added, "That's what I was asking when I came in. Remember, I was asking that --[.]" Again, Juror's response indicates she wanted further clarification on what role, if any, her personal experience played in her deliberations. We doubt whether someone truly mentally incompetent could make such a connection between a factual scenario, somewhat complicated legal principles, and personal experience and articulate that connection in a strange and intimidating setting. The record demonstrates Juror could and would follow the court's instructions.

*Allen and Johnson, supra,* 53 Cal.4th 60, is instructive. In that case, the California Supreme Court concluded the trial court in a capital case improperly discharged a juror during guilt phase deliberations for prejudging the case and relying on evidence not presented at trial. (*Id*. at p. 64.) The trial court based its conclusion on statements from two jurors who reported that during the second day of deliberations the juror said: (1) the prosecution rested without proving its case, and (2) testimony that a Hispanic coworker punched a witness's employment timecard for him was not credible because the juror believed Hispanics would never cheat on timecards. (*Id*. at p. 66.)

The *Allen and Johnson* court reversed, concluding the discharge was improper. (*Allen and Johnson, supra,* 53 Cal.4th at p. 79.) The court opined the meaning of the juror's statement "'When the prosecution rested, she didn't have a case[]'" was not completely clear. (*Id*. at p. 72.) The court reasoned the juror's remark was not an

explicit statement he had prejudged the case as evidenced by the fact the juror made the statement during deliberations, not before, and on the fifth day the juror cast an "'undecided'" vote and participated in the deliberative process. (*Id*. at p. 74.) The court also found dispositive the fact the trial court never questioned the juror about the statement and based his decision on the opinions of other jurors. (*Ibid*.) The *Allen and Johnson* court reasoned the juror's positive opinion about the reliability of Hispanics in the workplace was not an impermissible reliance on facts not in evidence but rather a permissible application of the juror's life experience to judge the credibility of the witness. (*Id*. at pp. 76-78.) The court held the possibility the juror's view was based on a weak premise was not a ground for discharge. (*Id*. at p. 78.)

We acknowledge the issue here is not that Juror prejudged the case or relied on facts not in evidence. Juror had a question about whether she could consider her life experience. But *Allen and Johnson*, *supra*, 53 Cal.4th 60, is instructive with respect to the standard of review and the fact the juror's inability to perform her duty must appear in the record as a demonstrable reality. Like in *Allen and Johnson*, the basis for Juror's discharge here does not appear on the record as a demonstrable reality, and the trial court's conclusion is not manifestly supported by the evidence on which the court relied. As we explain above, the court's conclusion Juror was incompetent to serve as a juror was not manifestly supported by the evidence because the evidence concerning her IQ was without foundation and speculative and the record demonstrated she was not intellectually impaired based on her life activities. Additionally, the notion Juror could not follow the court's instructions was not manifestly supported by the evidence because Juror heard the court's instructions, processed them, identified what she considered an issue with respect to her personal experience, and repeatedly answered she could follow the instructions.

The Attorney General, like the trial court, relies on the experts' testimony concerning the deficient abilities and skills of people with low IQs. But no one mentions

the fact Cervantes also testified Morales's IQ may be higher than the numbers indicate, in the low 70's, because he worked on a consistent basis and maintained relationships. Like Morales, the evidence established Juror worked, went to school, and maintained relationships (sons and people she cared for). All these activities were inconsistent with the experts' unanimous opinion people with an IQ in the mid-50s would not be able to function at that level.

The Attorney General argues Juror's mental incompetence appears in the record as a demonstrable reality based on the following: that Juror waited until deliberations to raise IQ issues, instead of when experts testified, "strongly suggests that she was afraid to, or unwilling to, engage in the deliberative process[;]" "many" of Juror's answers were either non-responsive or rambling; and Cervantes's and Ward's testimony support the court's ruling.

As to his first claim, the timing of Juror's disclosure and question does not demonstrate, or "strongly suggest," she was unwilling to deliberate. Her question immediately followed the court's instructions. She was merely seeking guidance about how to deliberate properly.

With respect to his second claim, the Attorney General cites to the trial court's question about whether Juror was subject to a conservatorship and what type of work she did. To the extent the Attorney General suggests a lack of familiarity with conservatorships is a sign of mental incompetence, we strongly disagree. If you have never had personal experience with conservatorship proceedings, how would you know what they are? We think it reasonable for jurors to be surprised, caught off guard, when they are serving as a juror to be asked whether they are subject to a conservatorship. We reject the Attorney General's suggestion someone who rambles, offers more information than is required to answer the question, is a sign of mental incompetence. Such answers were understandable considering the stressful setting and the serious nature of the proceedings. She was responsive to the topic of the court's question what she did for a

living. It was not as if the court asked her whether she lived in a group home and she answered she wanted to work in a funeral home as an embalmer.

As to his final claim, the experts' testimony concerning the abilities and skills of people with low IQs does not support the trial court's ruling. As we explain above, there was no evidence concerning Juror's IQ other than her representation her IQ two years earlier was in the 50s range. The experts' testimony was not evidence that manifestly supported the trial court's conclusion Juror was mentally incompetent. Therefore, we conclude the trial court erred by excusing Juror.

Under these circumstances, the court's error is prejudicial and requires we reverse the judgment. (*Armstrong, supra,* 1 Cal.5th at p. 454 [no double jeopardy bar to retrial]; *Cleveland, supra,* 25 Cal.4th at p. 486; *People v. Wilson* (2008) 44 Cal.4th 758, 841 [none of four grounds relied on to excuse juror a demonstrable reality and thus reverse penalty verdict].) At oral argument, the Attorney General relied on *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736 (*Bowers*), to contend we review an erroneous ruling pursuant to section 1089 under the harmless error standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 [reasonably probable more favorable result to defendant absent error]. Based on this record, *Bowers* is unpersuasive.

We recognize the trial court was faced with a complex issue under severe time constraints. The court had just asked the bailiff to escort the jury into the jury room when Juror revealed a highly personal fact that raised a unique legal issue where there is no published California law directly on point. There were 11 other jurors waiting to deliberate. The trial court conferred with counsel and decided on an approach it believed would ensure Juror properly discharged her duties. The court conducted a thorough and respectful inquiry into Juror's fitness to serve on the jury. We do stress, however, that in light of the trial court's comments concerning "years of appeals," the court's main focus should be reaching the correct decision and not on speculating how the appellate process will unfold.

However, "In reversing the judgment in this case, we remind trial courts that the removal of a seated juror . . . is a serious matter that implicates a defendant's state and federal constitutional right to a unanimous decision by the jury. [Citation.] Although a trial judge has discretion to remove a juror . . . , the exercise of that discretion should be undertaken with great care."[6] (*Armstrong, supra,* 1 Cal.5th at p. 454.)[7]

DISPOSITION

The judgment is reversed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

GOETHALS, J.

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[6] In reaching our conclusion we are not holding a trial court is prohibited from discharging a juror because of mental incompetence. Our conclusion is based solely on the fact the trial court's conclusion Juror was mentally incompetent is not a demonstrable reality based on the record before us.

[7] Because we reverse based on California law, we need not address Morales's assertion his federal constitutional rights were violated. (*Allen and Johnson, supra,* 53 Cal.4th at p. 65.)